IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY	:	CIVIL ACTION
v.	:	
U.S. HEALTHCARE, INC.	:	NO. 96-4659

MEMORANDUM AND ORDER

HUTTON, J. May 7, 1998

Presently before this Court is the Motion by Petitioner Northwestern National Life Insurance Company for Summary Judgment (Docket No. 17), and the Cross Motion by U.S. Healthcare Inc. for Summary Judgment (Docket No. 18). For the following reasons, the petitioner's motion is **DENIED** and the respondent's motion is **DENIED.**

I. BACKGROUND

This action arises out of a Reciprocal Marketing and Administrative Services Agreement (the "Agreement"), entered into between the petitioner, Northwestern National Life Insurance Company ("NWNL"), and the respondent, U.S. Healthcare, Inc. ("USHC"). NWNL's Mot. for Summ. J. ("Mot.") Ex. A. Pursuant to the Agreement, each party elected to coordinate and to promote joint sales of the other party's insurance products to prospective customers in the Atlanta, Georgia market. Id. ¶ 3. The contract specifically provided that in the event of a dispute, the parties would participate in a non-binding procedure in an attempt to resolve the conflict. Id. ¶ 9.17.1. If the non-binding procedure

failed to resolve the conflict, the parties agreed that the dispute would be resolved by arbitration, under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. (West 1970). NWNL's Mot. Ex. A. ¶ 9.17.2.

Approximately five months after the parties executed the contract, Aetna Life & Casualty Company ("Aetna"), one of NWNL's chief competitors, acquired USHC. McCormick Decl. ¶¶ 3, 4. Accordingly, NWNL expressed its concern to USHC that USHC could no longer "carry out its contractual obligations to use reasonable efforts to promote NWNL's insurance products." Id. ¶ 5.

On May 28, 1996, USHC and Corporate Health Insurance, Inc. ("CHI"), a USHC subsidiary, filed suit against NWNL and Reliastar Financial Corporation, ("Reliastar"), NWNL's parent company, in the Court of Common Pleas of Montgomery County, Pennsylvania, alleging claims for breach of contract, intentional interference with prospective economic advantage, and intentional interference with contractual relations. NWNL's Mot. Ex. D. On June 14, 1996, NWNL and Reliastar removed the action to the United States District Court for the Eastern District of Pennsylvania on the basis of diversity of citizenship of the parties. Two weeks later, NWNL filed an Application to Compel Arbitration before this Court.

On July 22, 1996, this Court consolidated the removed action and the arbitration petition. On December 19, 1996, this Court determined that it lacked subject matter jurisdiction, because NWNL

and CHI were not diverse. Moreover, the Court remanded the matter to the Court of Common Pleas of Montgomery County, Pennsylvania.

On January 21, 1997, NWNL appealed this Court's ruling to the United States Court of Appeals for the Third Circuit. On appeal, the Third Circuit found that this Court erred in dismissing and remanding the petitioner's Application to Compel Arbitration. Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc., No. 97 Civ. 1045, slip op. at 7 (3d Cir. Oct. 23, 1997). The Third Circuit stated that NWNL's:

> application for arbitration properly invoked the jurisdiction of the federal court. [NWNL] has a right to federal court determination of its entitlement to an order pursuant to 9 U.S.C. § 4 "directing the parties to proceed to arbitration in accordance with the terms of the agreement," provided it could establish an independent basis for federal jurisdiction. Because the parties to the lawsuit were diverse and the jurisdictional amount satisfied, [NWNL] met this requirement.

Id. Thus, the Third Circuit remanded the action, so that this Court could consider NWNL's Application to Compel Arbitration.

On November 26, 1997, NWNL filed its Motion for Summary Judgment, seeking an ordering compelling arbitration. On December 11, 1997, USHC filed its Cross Motion for Summary Judgment, asking this Court to dismiss the petitioner's Application to Compel Arbitration.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its

opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

"The mere fact that the parties have filed cross-motions under Rule 56(c) does not mean that the case will necessarily be resolved at the summary judgment stage." Reading Tube Corp. v. Employers Ins. of Wausau, 944 F. Supp. 398, 401 (E.D. Pa. 1996). "Where cross-motions for summary judgment are presented, each side essentially contends that there are no issues of material fact from the point of view of that party." Bencivenga v. Western Pa. Teamsters, 763 F.2d 574, 576 n. 2 (3d Cir. 1985). Accordingly, "[e]ach side must still establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Therefore, the court must consider the motions separately." Reading Tube Corp., 944 F. Supp. at 401 (citing Rains v. Cascade Indus. Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

B. The Federal Arbitration Act

The Federal Arbitration Act established a federal policy favoring arbitration and requiring that federal courts rigorously enforce agreements to arbitrate. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) and Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)); Perry v.

Thomas, 482 U.S. 483, 489 (1987). Section 2 of the Act provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1970). "The effect of [this] section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Perry, 482 U.S. at 489 (citing Moses H. Cone Mem'l Hosp., 460 U.S. at 24). By enacting this legislation, Congress intended to overrule the traditional refusal of the courts to make arbitration agreements as enforceable as other contracts, Dean Witter Reynolds, Inc., 470 U.S. at 219, and to effectuate the avoidance of unnecessary expense and delay of litigation where the parties had provided for the more efficient process of arbitration. See Dees v. Distenfield, 618 F. Supp. 123, 126 (C.D. Cal. 1985); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 584 (E.D. Cal. 1982); see also Gilling v. Eastern Airlines, Inc., 680 F. Supp. 169, 169 (D.N.J. 1988) (finding that purpose of arbitration is "to provide parties with a quick and inexpensive means of resolving their dispute while . . . reducing the court's caseload."). Thus, given the strong federal policy favoring arbitration, any doubts concerning the

scope of arbitration issues should be resolved in favor of arbitration. See Moses H. Cone Mem'l Hosp., 460 U.S. at 24; see also Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775, 777-78 (3d Cir. 1984).

Consistent with the liberal policy endorsing arbitration, the Federal Arbitration Act provides two principle enforcement routes for arbitration agreements in contracts evidencing a transaction involving interstate commerce. Under Section 3, an arbitration agreement may be passively enforced in an ongoing proceeding by a motion for a stay pending arbitration. 9 U.S.C. § 3. This section "envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate." Zosky v. Boyer, 856 F.2d 554, 556 (3d Cir. 1988), cert. denied, 488 U.S. 1042 (1989) (citing The Anaconda v. American Sugar Ref. Co., 322 U.S. 42, 44 (1944)). Section 3 mandates that the court stay proceedings before it, if satisfied that the issues before the court are arbitrable under the agreement. 9 U.S.C. § 3. Section 4 authorizes the district court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal" to comply with the arbitration agreement. 9 U.S.C. § 4. Where the conditions under Sections 3 or 4 are present, the "Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues

as to which an arbitration agreement has been signed." Dean Witter Reynolds, 470 U.S. at 218; see also Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) ("[T]he purpose of the act was to assure those who desired arbitration and whose contracts relate to interstate commerce that their expectations would not be undermined by federal judges . . ."") (quoting Metro Indus. Painting Corp. Terminal Constr. Corp., 287 F.2d 382, 387 (2d Cir. 1961), cert. denied, 368 U.S. 817 (1961) (Lumbard, C.J., concurring)); China Union Lines Ltd. v. American Marine Underwriters, Inc., 458 F. Supp. 132, 135 (S.D.N.Y. 1978).

C. Applicable Law

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. Under Section 2 of the FAA, state law applies to "issues concerning the validity, revocability, and enforceability of contracts generally." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 684 (1996) (quoting Perry, 482 U.S. at 492 n. 9); Willow Valley Manor v. Trouvailles, Inc., 977 F. Supp. 700, 702 (E.D. Pa. 1997) (citations omitted) ("The scope of an arbitration agreement is a question of federal law but state law governs whether the parties entered into an arbitration agreement.").

When, as in the present case, this court sits in diversity,[1] it must apply the substantive law of the state in which it is located, including the forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Accordingly, Pennsylvania's choice of law rules apply in the instant case.

Under Pennsylvania's choice of law rules, courts will follow a contractual choice of law provision set out by the parties provided that the state chosen bears a reasonable relation to the parties or the transaction. Lang Tendons, Inc. v. The Great S.W. Mktg. Co., No.CIV.A.90-7847, 1994 WL 159014, at *3 (E.D. Pa. Apr. 25, 1994); Novus Franchising, Inc. v. Taylor, 795 F. Supp. 122, 126 (M.D. Pa. 1992); Nova Ribbon Prods., Inc. v. Lincoln Ribbon, Inc., No.CIV.A.89-4340, 1992 WL 211544, at *3-5 (E.D. Pa. Aug. 24, 1992), aff'd, 995 F.2d 218 (3d Cir. 1993) (table). Section 9.13 of the Agreement, entitled "Governing Law", provides that "[t]his Agreement will be interpreted and enforced in accordance with the laws of Georgia." Accordingly, Georgia's substantive law applies provided that the parties or the transaction bear a reasonable relationship to Georgia.

Here, the transaction bears a reasonable relationship to Georgia so as to warrant upholding the parties' contractual choice

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1. The FAA "does not confer federal jurisdiction." See Northwestern Nat'l Life Ins. Co., No. 97-1045, slip op. at 9 n. 2. Instead, this Court's jurisdiction is based on diversity of the parties.

of law provision. Specifically, the subject of the Agreement was the solicitation of sales of certain NWNL products in Georgia. NWNL's Mot. Ex. A. §§ 1.1, 1.3. Accordingly, the Court shall apply Georgia's substantive law to the issue of "whether the parties entered into an arbitration agreement." Willow Valley Manor, 977 F. Supp. at 702 (citations omitted).

D. Analysis of the Parties' Motions

1. NWNL's Motion for Summary Judgment

In the instant matter, the parties do not dispute that NWNL and USHC entered into the Agreement on November 10, 1995. Section 9 of the Agreement states, in pertinent part:

> 9.8 Rights Cumulative; No Waiver. No right or remedy conferred upon or reserved to either party is intended to be exclusive of any other right or remedy except to the extent that the dispute resolution process in this Agreement is a requirement for obtaining other rights or remedies. Each and every right and remedy shall be cumulative. No delay or failure by either party to exercise at any time any right or remedy of this Agreement shall constitute a waiver thereof or of such party's right to exercise each and every right and provision of this Agreement.
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> . . . .
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> 9.17 Dispute Resolution Procedures. In the event of any dispute arising out of or relating to this Agreement, the parties agree that such dispute shall be resolved as set forth below. Except as specified elsewhere in this Agreement, this Agreement will remain in full force and effect and both parties will continue to provide services during the dispute resolution process.

9.17.1 The parties shall attempt in good faith to resolve the dispute or other matter promptly by negotiations between executives who have authority to settle the controversy ("Executives"). Either party may give the other party written notice of any dispute or matter not resolved in the ordinary course of business. Within fifteen (15) calendar days after said notice, executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to exchange relevant information and attempt to resolve the dispute. If the dispute or matter has not been resolved within sixty (60) calendar days after said notice, or if the parties fail to meet within fifteen (15) calendar days, either party may initiate mediation of the dispute as provided hereinafter. If an executive intends that an attorney shall accompany him/her to a meeting, the other Executive shall be given at least three (3) business days' notice of such intention and may also be accompanied by an attorney. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of all applicable rules of evidence.

9.17.2 Any dispute arising out of or relating to this Agreement or the breach, termination, or validity thereof, that has not been resolved by non-binding procedure as provided herein within sixty (60) calendar days of the initiation of such procedures, shall be finally resolved by arbitration conducted expeditiously in Atlanta, Georgia in accordance with the Center for Public Resources ("CPR") Rules for Non-Administered Arbitration of Business Disputes by a sole arbitrator; provided, however, that if one party has requested the other party to participate in a non-binding procedure and the other has failed to participate, the requesting party may initiate arbitration before expiration of the above period. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. Section 1, et seq. and judgment upon the award rendered by

> the arbitrator may be entered by any court having jurisdiction thereof. The place of arbitration shall be Atlanta, Georgia. Arbitrators shall not be empowered to award damages in excess of actual compensatory damages and each party hereby irrevocably waives any damages other than or in excess of actual compensatory damages.

Citing the language of the arbitration clause, NWNL seeks an order compelling arbitration. Furthermore, NWNL requests a stay of the proceedings in the Court of Common Pleas of Montgomery County. In support of its Motion, NWNL has demonstrated that the Arbitration Act governs the instant transaction.[2] NWNL's Mot. at 9-11, Exs. A & B. Moreover, NWNL has shown that the Agreement requires the parties to arbitrate their disputes. NWNL's Mot. Ex. A; McCormick Decl. ¶¶ 2, 6. Finally, NWNL offers evidence that the dispute in question is covered by the arbitration clause. Id. Thus, this Court finds that NWNL has substantiated its Motion for Summary Judgment

2. USHC's Cross Motion for Summary Judgment

"A court cannot order the arbitration of a claim unless the parties to a dispute have agreed to arbitration." Marschall v. Smith Barney, Inc., No. CIV.A.95-1647, 1995 WL 303636, at * 2 (E.D.

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2. The Act "embodies Congress' intent to provide for the enforcement of private agreements within the full reach of the Commerce Clause." Perry, 482 U.S. at 490. Accordingly, the definition of "commerce" in Section 2 includes "commerce among the several States." 9 U.S.C. § 1. The parties do not dispute that the obligations under the Agreement implicate interstate commerce as defined and interpreted under the Act. See NWNL's Mot. at 10; NWNL's Mot. Ex. A §§ 1.2, 2.2; USHC's Cross-Mot. for Summ. J. ("Mot.") at 5.

Pa. May 17, 1995) (citing Goodwin v. Elkins & Co., 730 F.2d 99 (3d Cir.), cert. denied, 469 U.S. 831 (1984)). Thus, prior to compelling a party to arbitrate, "§ 4 requires the court to ensure that a valid agreement to arbitrate exists between the parties." Marschall, 1995 WL 303636, at * 2 (citing Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989)).

In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967), the United States Supreme Court discussed the trial court's role in determining the validity of an agreement to arbitrate:

> In Prima Paint the purchaser of a paint business which entered into a consulting contract with the corporate seller to commence after the sale sought rescission of the contract on the grounds that the seller fraudulently represented that it was solvent and able to perform the contract when, in fact, it had filed a petition under Chapter 11 of the Bankruptcy Code shortly after execution of the agreement. 388 U.S. at 398 []. The seller argued that the contract's arbitration clause governed even allegations of fraud directed to the entire contract.
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> The Supreme Court noted that the issue was settled under Section 4 of the Act which permits the court to issue an order compelling arbitration only if "the making of the agreement for arbitration" is not in issue. Prima Paint, 388 U.S. at 403 [].
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> > Accordingly, if the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the 'making' of the agreement to arbitrate - the federal court may proceed to adjudicate it. But the statutory language does not

permit the federal court to consider

> the claims of fraud in the inducement of the contract generally.
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> 388 U.S. at 404 []. Although the case before the Court arose under Section 3, the Court ruled that this reasoning applied to that Section as well because it was "inconceivable that Congress intended the rule to differ depending upon which party to the agreement first invokes the assistance of a federal court." Id.

Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1367 (D.N.J. 1989). Thus, under a Section 4 claim, "the arbitration clause is to be treated as conceptually 'separable' from the remainder of the contract." Id.

Prima Paint "leaves federal courts with the rather rare and narrow issue of whether fraud was directed specifically to the arbitration clause while passing the more frequent and usually more complex question of whether fraud was directed to the entire contract to the arbitration panel." Id. "The challenge for the party who believes himself to be the victim of fraud and wishes to fight it out in court is to demonstrate that the fraud was specifically directed to the arbitration clause or to convince the court to craft some exception to the Prima Paint doctrine." Id. at 1368.

"'The teaching of Prima Paint is that a federal court must not remove from the arbitrators consideration of a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself. The

basis of the underlying challenge to the contract does not alter the . . . principle.'" Ian R. MacNeil et al., 2 Federal Arbitration Law, § 15.3.2 (1994) (quoting Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 529 (1st Cir. 1985)). Thus, Prima Paint's holding is not limited to allegations of fraud. In fact, the Prima Paint doctrine has been applied to several contractual defenses, including:

> illegality; consensual requirements such as whether a draft was intended to be a finalized contract and mutual mistake; authority issues, such as ultra vires; supervening event issues, such as frustration of purpose; consensual defenses, such as duress, 'overreaching,' and unconscionability; procedural requirements such as time limits on submission of claims against seller for defective goods; and statute of limitations running on the contract containing the arbitration clause. Some questions concerning scope of the arbitration clause may also be referred to arbitration. The doctrine may also be applied to issues relating to modification, waiver, and other termination of the arbitration agreement.

Ian R. MacNeil et al., supra, § 15.3.2 (footnotes omitted).

Prima Paint's separability principle, however, can be avoided by a valid attack on the arbitration clause. Ian R. MacNeil et al., supra, § 15.3.4 ("An attack based only upon a defective arbitration clause, such as fraud inducing the arbitration clause itself, is for the court to decide.") (footnote omitted). Thus,

> [n]o matter how serious the alleged invalidity of the contract containing the arbitration clause the dispute about invalidity goes to

> arbitration and only to arbitration, unless the claimed defect in some way particularly affects the arbitration clause as such. Only in the latter case does the court decide whether the defect exists, and then only to the extent necessary to decide the validity of the arbitration clause itself.

Id. (footnotes omitted).

In the instant action, USHC claims that NWNL's failure to provide services during the dispute resolution process invalidates the arbitration clause itself. More specifically, USHC argues that the Agreement is invalid because: 1) mandatory condition precedents to arbitration were not fulfilled; 2) NWNL fraudulently induced USHC to enter into the arbitration clause; 3) the arbitration clause lacked consideration; 4) USHC made a mistake concerning the arbitration; 5) NWNL engaged in bad faith; 6) NWNL anticipatorily repudiated the Agreement; 7) NWNL waived any right to compel arbitration; and 8) NWNL is estopped from attempting to compel arbitration.[3] Thus, this Court must consider whether NWNL's alleged breach of the agreement affects the validity of the arbitration clause.

a. Condition Precedent

Under Georgia law, "[c]onditions may be precedent or subsequent. A condition precedent must be performed before the

3. USHC also contends that this Court lacks subject matter jurisdiction and that CHI is an indispensable party. However, the Third Circuit previously rejected these arguments. See Northwestern Nat'l Life Ins. Co., No. 97-1045, slip op. at 7, 9.

contract becomes absolute and obligatory upon the other party." Ga. Code Ann. § 13-3-4 (1997). Thus, "the nonoccurrence of a condition precedent discharges the obligor's duty to perform." Gymco Constr. Co. v. Architectural Glass & Windows, Inc., 884 F.2d 1362, 1364-65 (11th Cir. 1989).

No "precise technical words are necessary to create a condition" to performance. Fulton County v. Collum Properties, Inc., 388 S.E.2d 916, 918 (Ga. Ct. App. 1989). Moreover,

> precise technical words [are not] necessary to create a covenant. However, "[w]ords such as 'on condition that,' 'if,' and 'provided,' are words of condition, and in the absence of indication to the contrary, the employment of such words in a contract creates conditions precedent." 6 EGL, Contracts § 83. Also, "[e]xpress statements to the effect that a condition is to be construed as a condition precedent are often contained in contracts and are entitled to be so construed in carrying out the intent of the parties." Id. . . . . Nevertheless the absence of such words does not per se resolve this matter.

Id.

While a party need not include specific language in order to create a condition precedent, Georgia law does not favor interpreting clauses as such. In fact, a general rule of contract construction under Georgia law is that "promises in a contract should be construed as covenants rather than conditions if the text permits." Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 484 (5th Cir. 1981) (citing Ga. Code Ann. § 37-216; Floyd v. Hoover, 234 S.E.2d 89 (Ga. Ct. App. 1977)); see also Fulton County

v. Collum Properties, Inc., 388 S.E.2d 916, 918 (Ga. Ct. App. 1989)

("[w]here the rules of construction will allow, equity seeks always to construe conditions subsequent into covenants").

Furthermore, "'[w]here terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.'" Id. (quoting Health Svc. Ctrs., Inc. v. Boddy, 359 S.E.2d 659 (Ga. 1987)). Moreover, where the parties to a contract include an integration clause, Georgia law forbids the parties from using "parol evidence to show conditions precedent to the contract," in the absence of fraud, accident, or mistake. Lyon v. Patterson, 227 S.E.2d 423, 426 (Ga. Ct. App. 1976); Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc., 228 S.E.2d 142, 143 (Ga. Ct. App. 1976).

In the instant action, USHC asserts that Section 9.17, which requires the parties to provide services during the dispute resolution process, constitutes a condition precedent to arbitration. Moreover, USHC offers evidence that NWNL failed to provide services during the dispute. Simon Decl. ¶¶ 2-4. Accordingly, USHC argues that it should not be compelled to arbitrate. In response, NWNL contends that its obligation to provide services does not constitute a condition precedent to arbitration. NWNL's Mot. at 20-22.

This Court finds that USHC's argument must fail.[4] The language concerning the dispute resolution process is clear and precise, and lacks any terms regarding prerequisites to arbitration. While the language relied on by USHC may have created a condition precedent to NWNL's rights under the Agreement, the Agreement does not manifest an intent to create a specific condition precedent to the formation of the arbitration provision.

Moreover, the Agreement includes an integration clause. See NWNL's Mot. Ex. A. § 9.14. Although USHC claims that the parties intended to create a condition precedent to arbitration,[5] "[t]he omission of any such contingency in the writing precludes the offer of proof upon it." Lyon, 227 S.E.2d at 426. Further, this Court finds that USHC has failed to offer evidence of fraud, mistake, or accident. See, infra. Accordingly, this Court finds that NWNL's promise to continue providing services is not a condition precedent to USHC's promise to arbitrate, and USHC's Motion is denied in that respect.

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4. Specifically, USHC cites the following language in support of its argument: "Except as specified elsewhere in this Agreement, this Agreement will remain in full force and effect and both parties will continue to provide services during the dispute resolution process." Agreement § 9.17.1 (emphasis added). Moreover, USHC quotes Section 9.8 of the Agreement, which states that: "No right or remedy conferred upon or reserved to either party is intended to be exclusive of any other right or remedy except to the extent that the dispute resolution process in this Agreement is a requirement for obtaining other rights or remedies." Agreement § 9.8 (emphasis added).

5. In support of this argument, USHC offers the declaration of David F. Simon ("Simon"), the Vice President and Principle Legal Officer of Aetna U.S. Healthcare Inc. USHC's Mot. Ex. A. Simon states that NWNL's promise to continue to provide services "was intended to be an express condition precedent to any alleged agreement to arbitrate." USHC Mot. Ex. A. ¶ 7.

b. Fraudulent Inducement

"It is well-settled that a party to an agreement may avoid enforcement of an arbitration clause if it can be shown that the agreement to arbitrate was procured by fraud in the inducement." Gouger v. Bear, Stearns & Co., Inc., 823 F. Supp. 282, 285 (E.D. Pa. 1993) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 n. 11 (1984)). Where the "claim of fraud in the inducement pertains to the contract generally," however, "the court is unable to adjudicate it." Gouger, 823 F. Supp. at 285 (citing Prima Paint Corp., 388 U.S. at 404).

Under Georgia law, a party may seek to void a contract by claiming either actual or constructive fraud. Actual fraud "constitut[ing] a ground for voiding a contract," requires five elements. Allen v. Sanders, 337 S.E.2d 428, 429 (Ga. Ct. App. 1985). A party must show: "(1) a false representation . . . (2) scienter; (3) an intention to induce [the other party] to act or [to] refrain from acting in reliance thereon; (4) justifiable reliance . . . ; [and] (5) damage . . . ." Id. (quoting Tolar Constr. Co. v. GAF Corp., 267 S.E.2d 635, 638 (Ga. Ct. App.), rev'd on other grounds, 271 S.E.2d 811 (Ga. 1980)). "Misrepresentation of a material fact, if made by mistake, and innocently, and acted on by the opposite party to his injury, constitutes constructive

fraud." Southeastern Greyhound Lines, Inc. v. Fisher, 34 S.E.2d 906, 909 (Ga. Ct. App. 1945).

"Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to [sustain a finding] of its existence." Allen, 337 S.E.2d at 429 (quoting Tolar Constr. Co., 267 S.E.2d at 638). Thus, a claim of fraud normally requires factual determinations by a jury. Id. "However, when the existence of fraud is so subtle as to be non-existent," a court may find that fraudulent inducement does not exist. Douglas v. Standard, 382 S.E.2d 419, 420 (Ga. Ct. App. 1989).

In the instant matter, USHC contends that NWNL fraudulently induced USHC to enter into the arbitration agreement. To support this defense, USHC alleges that NWNL made "misrepresentations that NWNL intended to continue providing services under the Agreement during any dispute resolution process." USHC's Mot. at 28. Thus, USHC concludes that NWNL fraudulently induced USHC to enter into the arbitration clause.

While USHC has submitted evidence that it relied on NWNL's promise to continue providing services, Simon Decl. ¶ 8, it has not presented sufficient evidence to justify a finding of fraudulent inducement. USHC has not shown that NWNL made a false representation, or that it intended to induce USHC to enter into the arbitration clause. Accordingly, USHC has failed to offer any evidence to substantiate its claim that NWNL fraudulent induced

USHC to enter into the arbitration clause.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc., 974 F.2d at 1363. Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., 982 F.2d at 890. In the instant matter, because USHC failed to present any evidence of fraudulent inducement, the Court denies USHC's motion in this regard.

c. Failure of Consideration

USHC argues that the agreement to arbitrate must fail for lack of consideration, because NWNL failed to continue providing services, as required under Section 9.17. USHC's Mot. at 30-31. "There is no question of the general rule of law that where there is total failure of consideration, and a defendant has derived no benefit from a contract, such total failure of consideration may be shown in bar of action on the contract." Vanguard Properties Dev. Corp. v. Murphy, 221 S.E.2d 691, 693 (Ga. Ct. App. 1975) (citations omitted); see National Organic Corp. v. Southern Bag Corp., 140 S.E.2d 890, 891 (Ga. Ct. App. 1965) (citing Robbins v. Hays, 128 S.E.2d 546 (Ga. Ct. App. 1962) ("A plea of total or partial failure

of consideration is a permissible defense to an action founded upon contract."). "The burden of sustaining the plea of total or partial consideration is on the one asserting the defense." National Organic Corp., 140 S.E.2d at 891 (citing Robbins, 128 S.E.2d 546; Messer v. Hewitt, 106 S.E.2d 61 (1958)). To meet its burden regarding complete failure of consideration, the party "must show . . . that the consideration has totally failed." Robbins, 128 S.E.2d at 547.

In the instant action, USHC argues that "NWNL provided no services under the Agreement, yet seeks to self-servingly and unilaterally enforce [sic] a provision therein." USHC's Mot. at 31. Moreover, USHC offers Simon's declaration, wherein he states that NWNL's agreement to continue services during any dispute resolution process "was intended to be and was material consideration to any alleged agreement to arbitrate under Section 9.17, without which USHC would not agree to arbitrate." USHC's Mot. Ex. A ¶ 8. In response, NWNL offers the declaration of Daniel McCormick ("McCormick"), a Vice President of NWNL, wherein McCormick states that USHC breached its duties under the Agreement by failing to attempt to resolve the dispute. NWNL's Mot. Ex. B ¶ 8.

At this stage, this Court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc., 974 F.2d at 1363. Moreover, this Court may not consider

the credibility or weight of the evidence. Id. USHC has offered evidence substantiating its lack of consideration defense to the arbitration agreement, in the form of the Simon Declaration. NWNL presents evidence rebutting USHC's assertions, in the form of the McCormick Declaration. Accordingly, this Court finds that there is a genuine issue of material fact regarding USHC's failure of consideration defense.

d. Unilateral Mistake

Georgia law "provides for recision and cancellation [of a contract] 'upon the ground of mistake of fact material to the contract of one party only.'" First Baptist Church of Moultrie v. Barber Constr. Co., 377 S.E.2d 717, (Ga. Ct. App. 1989) (citing Ga. Code Ann. § 23-2-32). However, "'[r]elief is not available on the basis of a unilateral mistake in the absence of fraud or inequitable conduct or other special circumstances.'" Sepulvado v. Daniels Lincoln-Mercury, Inc., 316 S.E.2d 554, 557 (Ga. Ct. App. 1984) (quoting Sellers v. Alco Fin. Inc., 204 S.E.2d 478 (Ga. Ct. App. 1974)).

USHC asserts that the arbitration agreement is void "because of USHC's unilateral mistake in believing that NWNL would continue performance under the Agreement as a condition precedent to any obligation to arbitrate disputes." USHC's Mot. at 31. Moreover, USHC contends that NWNL, "with full knowledge of USHC's beliefs, purposefully misled USHC and disregarded the language of the

Agreement." Id. at 32-33. USHC, however, fails to support its contentions with any depositions, answers to interrogatories, admissions on file, or affidavits. Thus, the Court denies USHC's Motion as it relates to its unilateral mistake defense.

e. Bad Faith

Under Georgia law, "both parties [to a contract] are under an implied duty of good faith in carrying out the mutual promises of their contract." Jackson Elec. Membership Corp. v. Georgia Power Co., 364 S.E.2d 556, 558 (Ga. 1988) (citing Brack v. Brownlee, 273 S.E.2d 390 (Ga. 1980)). "A duty of good faith and fair dealing is implied in all contracts in [Georgia]." Southern Bus. Mach. of Savannah, Inc. v. Norwest Fin. Leasing, Inc., 390 S.E.2d 402, 405 (Ga. Ct. App. 1990) (citation omitted). This duty "'requires both parties to a contract to perform their promises and [to] provide such cooperation as is required for the other party's performance.'" Stargate Software Int'l, Inc. v. Rumph, 482 S.E.2d 498, 504 (Ga. Ct. App. 1997). "Thus, 'whenever the co-operation of the promisee is necessary for the performance of the promise, there is a condition implied that the co-operation will be given.'" Southern Bus. Mach. of Savannah, Inc., 390 S.E.2d at 405 (quoting 17 Am. Jur. 2d Contracts § 256). However, "there 'can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do.'" Marathon U.S. Realties, Inc. v. Kalb, 260 S.E.2d

85, 87 (Ga. 1979) (quoting Automatic Sprinkler Corp. of Am. v. Anderson, 257 S.E.2d 283, 284 (Ga. 1979)).

USHC claims that because NWNL acted in "bad faith in the making of and refusal to comply with the dispute resolution clause," the agreement to arbitrate is not binding on USHC. USHC's Mot. at 33. "As evidence of bad faith," USHC contends that "NWNL blatantly disregarded the mandatory conditions precedent to an alleged agreement to arbitrate. Further, [USHC argues that] NWNL failed to exchange the agreed-upon and bargained-for consideration that was vital to Section 9.17's dispute resolution procedures." Id.

This Court finds that NWNL did not breach the implied duty of good faith and fair dealing by refusing to comply with the alleged condition precedent to arbitration, because this Court finds that no such condition precedent to arbitration existed under the terms of the Agreement. See, supra, at 17-18 (finding that provision requiring NWNL to continue providing services is not a condition precedent to NWNL's right to arbitration). Moreover, USHC fails to offer any evidence to support its argument that NWNL owed an implied duty of good faith or breached that duty by failing to continue providing services. Accordingly, USHC's Motion is denied with respect to its argument that NWNL engaged in bad faith.

f. Anticipatory Repudiation

Anticipatory repudiation of a contract, under Georgia law,

> occurs when one party thereto repudiates his contractual obligation to perform prior to the time such performance is required under the terms of the contract. While technically such a repudiation is not a breach of contract, the contractual time for performance not having arrived, the law recognizes that under certain circumstances the innocent party to the contract may treat such an anticipatory repudiation as a breach thereof. Thus when one party to a bilateral contract of mutual dependent promises absolutely refuses to perform and repudiates the contract prior to the time of his performance, the innocent party is at liberty to consider himself absolved from any future performance on his part and has an election of several possible remedies, including the right to rescind the contract altogether and recover the value of any performance he has already rendered.

CCE Fed. Credit Union v. Chesser, 258 S.E.2d 2, 4-5 (Ga. Ct. App. 1979) (citations omitted). However, a "'willingness to negotiate an offer of performance at variance with the terms of the agreement demonstrates the offering party's intention to abide by the contract and does not result in an anticipatory breach.'" J.M. Clayton Co. v. Martin, 339 S.E.2d 280, 231 (Ga. Ct. App. 1985) (quoting Pacific Coast Eng'g Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889, 895 (9th Cir. 1969)).

USHC argues that "NWNL's deliberate decision to not provide [sic] services pursuant to the dispute resolution clause repudiated any alleged agreement to arbitrate." USHC's Mot. at 34. Moreover, USHC asserts that "NWNL declared its clear intention to not provide [sic] any services under the Agreement, in direct contravention of the dispute resolution clause's conditions precedent. Such

anticipatory (and, indeed, actual) repudiation of the arbitration clause's material conditions renders any alleged agreement to arbitrate void and unenforceable against USHC." Id. (citation omitted).

USHC's argument, however, must fail, because this Court finds that no such condition precedent to arbitration existed under the terms of the Agreement. See, supra, at 17-18 (finding that provision requiring NWNL to continue providing services is not a condition precedent to NWNL's right to arbitration). Accordingly, any declaration by NWNL of its intention to refuse to provide services cannot constitute an anticipatory repudiation of the agreement to arbitrate. Thus, USHC's motion must be denied, as it relates to USHC's argument that NWNL anticipatorily repudiated the agreement to arbitrate.

g. Waiver

"An arbitration clause of a contract may be repudiated, waived, or abandoned, by either or both parties to a contract. An agreement to arbitrate is waived by any action of a party which is inconsistent with the right of arbitration." McCormick-Morgan, Inc. v. Whitehead Elec. Co., 345 S.E.2d 53, 55-56 (Ga. Ct. App. 1986) (citations omitted); see Roswell Properties, Inc. v. Salle, 430 S.E.2d 404, 407 (Ga. Ct. App. 1993) (finding defendant waived right to arbitration by repudiating the contract, rather than submitting disputes to arbitration); Weyant v. MacIntyre, 438

S.E.2d 640, 642 (Ga. Ct. App. 1993) (citations omitted) (waiver by taking "legal action inconsistent with arbitration" usually requires a finding that "the party seeking to rely upon an arbitration clause did not promptly invoke or seek to enforce the clause."). While a party's waiver may be implied by its conduct, "a showing of prejudice to the other party [resulting from its reliance] appears to be the central requirement of waiver by implied conduct." Mauldin v. Weinstock, 411 S.E.2d 370, 374 (Ga. Ct. App. 1991) (citing 28 Am. Jur. 2d Estoppel & Waiver § 30).

USHC states that "NWNL's actions in this matter waiv[ed] any right to arbitration," USHC's Mot. at 35, because "NWNL disregarded the dispute resolution clause to the extreme prejudice of USHC and CHI." Id. at 36. Moreover, USHC argues that NWNL waived its right to arbitration by "fil[ing] counterclaims against USHC in the state court action." Id.[6]

As explained above, "a showing of prejudice to the other party appears to be the central requirement of waiver by implied

6. USHC fails to explain how NWNL waived its right to compel arbitration merely by filing counterclaims against USHC in the state court action. See American Car Rentals, Inc. v. Walden Leasing, Inc., 469 S.E.2d 431, 434 (Ga. Ct. App. 1996) (finding party waived arbitration agreement by initiating legal action, failing to mention arbitration in complaint, and failing to file motion to compel arbitration or motion to stay); National Parents' Resource Inst. for Drug Educ., Inc. v. Peachtree Hotel Co., 411 S.E.2d 884, 886 (Ga. Ct. App. 1991) (finding waiver of agreement to arbitrate where party "participated fully in the defense of the action without ever requesting or demanding arbitration, moving for dismissal, moving for a stay, or moving to compel arbitration, or taking any action to present the arbitration issue to the trial court for a ruling."). Clearly, USHC cannot argue that NWNL's actions in pursuit of arbitration are analogous to the parties' conduct in American Car Rentals, Inc. and National Parents' Resource Inst. for Drug Educ., Inc..

conduct." Mauldin, 411 S.E.2d at 374 (citing 28 Am. Jur. 2d Estoppel & Waiver § 30). While USHC argues that NWNL's actions caused "extreme prejudice" to USHC, it fails to substantiate its broad assertion. USHC "must do more than rest upon mere allegations, general denials, or vague statements" at the summary judgment stage. Trap Rock Indus., 982 F.2d at 890. Accordingly, USHC's Motion is denied as it relates to its waiver defense to the agreement to arbitrate.

h. Estoppel

Under Georgia law,

> [t]he essential elements of an equitable estoppel, or an estoppel in pais, are as follows as related to the party against whom the estoppel is sought: (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts; and, as to the party claiming the estoppel: (1) lack of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Bell v. Studdard, 141 S.E.2d 536, 540 (Ga. 1965) (citations omitted); see Horne v. Exum, 419 S.E.2d 147, 148-49 (Ga. Ct. App. 1992) (following and discussing Bell). Furthermore,

> "[t]he doctrine of estoppel is predicated upon

> a change of position to the hurt of one of the parties acting on the representations or conduct of the other." Morgan v. Maddox, 216 Ga. 816(1d), 120 S.E.2d 183 [(1961)]. Code Ann. § [24-4-27], by its very terms, requires that, in order for an equitable estoppel to arise, the party seeking such an estoppel must have been "misled to his injury."

McFarland v. Beardsly, 252 S.E.2d 72, 74 (Ga. Ct. App. 1979); see Peter E. Blum & Co. v. First Bank Bldg. Corp., 275 S.E.2d 751, 754 (Ga. Ct. App. 1980) (discussing requirement that party be misled). Thus, "'[t]he distinguishing feature of estoppel is the inducement to another to act to his prejudice.'" Turnipseed v. Jaje, 477 S.E.2d 101, 104 n. 1 (Ga. 1996) (quoting Griggs v. Dodson, 154 S.E.2d 252, 256 (Ga. 1967)).

USHC contends that NWNL is estopped from asserting its rights under the agreement to arbitrate, because NWNL "misrepresented its intentions and disregarded express conditions of the purported agreement." USHC's Mot. at 37. Moreover, USHC asserts that "NWNL caused USHC to rely upon NWNL's representations regarding the common purpose and intention of the parties in entering the purported agreement to arbitrate, when in fact, NWNL clearly had no intention to [fulfill] the conditions in the Agreement." Id.

USHC's contentions are again unsupported by any evidence. As this Court previously found, USHC fails to offer any evidence that NWNL made a misrepresentation. See, supra, at 21. While USHC has presented evidence that it relied on NWNL's "agreement to

continue providing services," USHC has not demonstrated how it has been prejudiced by its reliance. See, supra, at 30. Accordingly, USHC's Motion is denied as it relates to its estoppel defense to the arbitration agreement.

III. CONCLUSION

Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue of material fact. Celotex Corp., 477 U.S. at 324. In this case, NWNL adequately supported its motion for summary judgment. Moreover, USHC adequately supported its cross motion for summary judgment, with respect to its failure of consideration defense. In response, NWNL has offered evidence to show that there is a genuine issue of material fact with regard to that issue. Accordingly, this Court denies both NWNL's Motion and USHC's Cross Motion.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY	:	CIVIL ACTION
v.	:	
U.S. HEALTHCARE, INC.	:	NO. 96-4659

O R D E R

AND NOW, this 7th day of May, 1998, upon consideration of the Motion by Petitioner Northwestern National Life Insurance Company for Summary Judgment (Docket No. 17), and the Cross Motion by U.S. Healthcare, Inc. for Summary Judgment (Docket No. 18), IT IS HEREBY ORDERED that the parties' Motions are **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.